

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

IN THE MATTER OF:

Union Pacific Railroad  
Wallace-Mullan Branch  
Northern Idaho

Union Pacific Railroad Company, Inc.,  
Respondent

ADMINISTRATIVE ORDER ON  
CONSENT FOR PAYMENT OF CERTAIN  
OVERSIGHT COSTS AND INTERIM  
PERFORMANCE OF REMOVAL  
ACTIONS

U.S. EPA, Region 10  
CERCLA Docket No. CERCLA-10-2000-0115

Proceeding Under Sections 104,  
106(a), 107, and 122 of the  
Comprehensive Environmental  
Response, Compensation, and  
Liability Act, as amended,  
42 U.S.C. §§ 9604, 9606(a),  
9607, and 9622

**I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the U.S. Environmental Protection Agency ("EPA") and Union Pacific Railroad Company, Inc., ("UPRR" or "Respondent") for the payment of certain response costs incurred or to be incurred by

ADMINISTRATIVE ORDER ON CONSENT  
UPRR WALLACE-MULLAN BRANCH



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2 the United States and for the performance of certain response actions in connection with the railroad  
3 right-of-way ("ROW") owned or controlled by Respondent and known as the Wallace-Mullan  
4 Branch. The payment of response costs and performance of response actions in connection with the  
5 ROW, including those addressed by this Order, are all subjects of a consent decree lodged with the  
6 U.S. District Court of Idaho on December 23, 1999. Upon judicial entry of the Consent Decree, the  
7 requirements of this Order shall be superseded and this Order shall terminate and be of no further  
8 force or effect.

9       2. This Order is issued pursuant to the authority vested in the President of the United  
10 States by Sections 104, 106(a), 107, and 122 of the Comprehensive Environmental Response,  
11 Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9604, 9606(a), 9607, and 9622  
12 ("CERCLA"), and delegated to the Administrator of the United States Environmental Protection  
13 Agency ("EPA") by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, and  
14 further delegated to the EPA Regional Administrators by EPA Delegation Nos. 14-14-A and  
15 14-14-D. This authority has been further redelegated to the Unit Managers of the EPA Region 10  
16 Environmental Cleanup Office through delegation Nos. R1014-14-A and R1014-14-D.

17       3. EPA has notified the State of Idaho and Coeur d'Alene Tribe of this action pursuant  
18 to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

19       4. Except in a proceeding to enforce the terms of this Order, Respondent's participation  
20 in this Order shall not constitute or be construed as an admission of liability or of EPA's findings or  
21 conclusions of law and determinations contained in this Order.

22       5. Respondent agrees to comply with and be bound by the terms of this Order.  
23 Respondent further agrees that it will not contest the basis or validity of this Order or its terms.  
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## II. PARTIES BOUND

6. This Order applies to and is binding upon EPA, and upon Respondent and Respondent's successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Order.

7. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

## III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the attachments hereto and incorporated hereunder, the following definitions shall apply:

- A. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, et seq.;
- B. "Coeur d'Alene Basin Environment" shall mean: (1) the watershed of the South Fork and the North Fork of the Coeur d'Alene River, the main stem of the Coeur d'Alene River and its floodplain, including the lateral lakes and associated wetlands, and Lake Coeur d'Alene; (2) the ROW and all current or historical branches, sidings, spur tracks, bridges and structures thereon or connected thereto that are within or adjacent to the area described in subpart (1) of this definition, with the exception of the Excluded Rail Lines; and

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2 (3) all staging areas, Waste Material handling, storage or disposal areas, and  
3 other areas to be used by Respondent in connection with performance of the  
4 Work as described in the SOW.

- 5 C. "Consent Decree" shall mean the consent decree signed by the United States,  
6 EPA, State of Idaho, Coeur d'Alene Tribe, and UPRR, and lodged with the  
7 U.S. District Court of Idaho on December 23, 1999, including all attachments  
8 and appendices thereto.
- 9 D. "Construction Oversight Costs" shall mean all response costs incurred by the  
10 Governments' Project Coordinator and others designated by the Governments'  
11 Project Coordinator, in the course of overseeing and providing advice  
12 regarding the design and implementation of the Work.
- 13 E. "Day" shall mean a calendar day unless expressly stated to be a working day.  
14 "Working day" shall mean a day other than a Saturday, Sunday, or federal  
15 holiday. In computing any period of time under this Order, where the last day  
16 would fall on a Saturday, Sunday, or federal holiday, the period shall run until  
17 the close of business of the next working day;
- 18 F. "EE/CA" shall mean the Engineering Evaluation/Cost Analysis prepared for  
19 the Union Pacific Railroad Wallace-Mullan Branch, dated January 15, 1999,  
20 and incorporated by reference herein;
- 21 G. "EPA" shall mean the United States Environmental Protection Agency and  
22 any successor departments or agencies of the United States;
- 23 H. "Excluded Rail Lines" shall mean that portion of the railroad right-of-way for:  
24 (i) the active rail line within certain areas of Plummer Junction and between  
25 Plummer Junction and Spokane, Washington that is located on the Coeur  
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2 d'Alene Indian Reservation situated within northern Idaho ("Reservation"),  
3 and (ii) the abandoned line within certain areas of Plummer Junction and  
4 between Plummer Junction and Tekoa, Washington that is located on the  
5 Reservation. The precise location of the Excluded Rail Lines is set forth in  
6 the map identified as Appendix F to the Consent Decree.

7 I. "Future Response Costs" shall mean all response costs, including, but not  
8 limited to, direct and indirect costs, that the EPA incurs after September 1,  
9 1999, in reviewing or developing plans, reports, and other items pursuant to  
10 this Order, verifying the Work, or otherwise implementing, overseeing, or  
11 enforcing this Order, including, but not limited to, payroll costs, contractor  
12 costs, travel costs, laboratory costs, Construction Oversight Costs, costs  
13 related to Paragraph 27 (Access) (including, but not limited to, the cost of  
14 attorney time and any monies paid to secure access and/or to secure or  
15 implement institutional controls), and costs related to Paragraph 33  
16 (Emergency Response). Future Response Costs shall also include all Interest  
17 on the Past Response Costs pursuant to Section 107(a) of CERCLA, 42 U.S.C.  
18 § 9607(a).

19 J. "Governments' Project Coordinator" shall mean the U.S. Army Corps of  
20 Engineers individual so designated by EPA, the State, and the Tribe to provide  
21 advice and oversight on behalf of the Governments over Respondent and  
22 Respondent's agents, contractors, subcontractors, and representatives.

23 K. "Governments" shall mean the EPA, State, and Tribe, and agencies thereof.

24 L. "Interest" shall mean interest at the rate specified for interest on investments  
25 of the Hazardous Substance Superfund established under Subchapter A of  
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Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a);

- M. "Matters Addressed" shall mean all Work under this Order, all response actions taken or to be taken and all response costs incurred or to be incurred by EPA or any other person or entity relating to the presence of Waste Materials at, or the release or threatened release of Waste Materials from:
- (i) the ROW and those portions of Plummer Junction which are identified in the SOW as being a part of the Work, including the inactive rail lines within Plummer Junction that are owned or controlled by Respondent as well as the portion of the ROW in the Plummer Junction that was abandoned in 1955;
  - (ii) all staging areas and other areas to be used by Respondent in connection with performance of the Work as described in the SOW; and (iii) all handling, storage or disposal areas for Waste Materials approved under this Order.
- "Matters Addressed" in this Order do not include those response costs or response actions as to which EPA has reserved its rights under this Order (except for claims for failure to comply with this Order), in the event that EPA asserts rights against Respondent coming within the scope of such reservations.
- N. "Mine Waste" shall include jig and flotation tailings, mine waste rock, ores, and ore concentrates, all of which are derived from mining activities.
- O. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto;

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- 2 P. "Order" shall mean this Administrative Order on Consent, as may be
- 3 modified, and all attachments hereto, including the SOW, and all documents
- 4 incorporated by reference or that may be attached upon approval by EPA and
- 5 UPRR. In the event of conflict between this Order and the SOW, the SOW
- 6 shall control. In the event of conflict between this Order and any other
- 7 attachment, this Order shall control;
- 8 Q. "Paragraph" shall mean a portion of this Order identified by an Arabic
- 9 numeral or an upper case letter;
- 10 R. "Project Area" shall mean the main line and related sidings of the ROW
- 11 except as noted below. Project Area shall also include those portions of
- 12 Plummer Junction which are identified in the SOW as being a part of the
- 13 Work, including the inactive rail lines within Plummer Junction that are
- 14 owned or controlled by Union Pacific as well as the portion of the ROW in the
- 15 Plummer Junction that was abandoned in 1955. The 7.9 mile section of the
- 16 ROW within the Bunker Hill Superfund Site has been addressed as part of the
- 17 Bunker Hill Superfund Site Record of Decision (EPA, 1992), and except as
- 18 otherwise specified in the SOW and its attachments is excluded from this
- 19 definition. Project Area does not include: (1) the Excluded Rail Lines; (2) the
- 20 spurs or connecting branch lines outside of the ROW; (3) the Wallace Yard
- 21 between mile marker 78.5 and 79.8; (4) that portion of the Mullan Branch
- 22 between mile marker 7.15 and 7.6 that may include encroachments on the
- 23 ROW from the Lucky Friday Mine haul road; and (5) the areas identified on
- 24 the Response Action Design Drawings as possible encroachments on the
- 25 ROW by the Hecla tailings impoundment, the Morning Mine rock dump, the
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2 waste impoundment and the Burns Yaak Mine dump. The Project Area also  
3 includes all staging areas, Waste Material handling, storage and disposal areas  
4 within the Coeur d'Alene Basin Environment, and other areas to be used by  
5 Respondent in connection with performance of the Work as described in the  
6 SOW.

7 S. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§  
8 6901, et seq. (also known as the Resource Conservation and Recovery Act);

9 T. "Right-of-Way" or "ROW" shall mean: (1) the Wallace Branch right-of-way  
10 which extends for 63.8 miles from mile marker 16.6 at Plummer Junction to  
11 mile marker 80.4 in Wallace; (2) the Mullan Branch right-of-way which  
12 extends 7.6 miles from mile marker 0 at Wallace to the east side of Mullan at  
13 mile marker 7.6; and (3) all sidings, bridges and structures thereon or  
14 connected thereto. The geographic scope of the ROW is shown on the  
15 Remedial Action Design Drawings which are based on railroad valuation maps.  
16 In the event the ROW as depicted in the Remedial Action Design Drawings is  
17 unclear, the railroad valuation maps shall determine the ROW.

18 U. "State" shall mean the State of Idaho or agencies thereof, including the Idaho  
19 Department of Environmental Quality ("IDEQ") and Idaho Parks and  
20 Recreation Department, and any successor departments or agencies of the  
21 State;

22 V. "Statement of Work" or "SOW" shall mean the written specifications of the  
23 Work to be performed by Respondent pursuant to this Order and as attached  
24 to this Order as Appendix A, together with all of its attachments, revisions, and  
25 modifications thereto approved by EPA. The SOW has been developed by the  
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United States, State, Tribe, and Respondent and designated as Appendix G of the Consent Decree.

W. "Supervising Contractor" shall mean the principal contractor retained by the Respondent to supervise and direct the implementation of the Work under this Order;

X. "Tribe" shall mean the Coeur d'Alene Tribe.

Y. "United States" shall mean the United States of America;

Z. "Waste Material" shall mean (1) Mine Waste; (2) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (3) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (4) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (5) any "hazardous waste" under Section 1004(5) of RCRA, 42 U.S. § 6904(5), or hazardous constituent as defined at 40 C.F.R. § 260.10 pursuant to RCRA; and (6) any "hazardous waste," "solid waste" or "toxic" material under applicable Federal, State or Tribal law.

AA. "Work" shall mean all activities Respondent is require to perform under Section VI of this Order as set forth in the SOW, except that required by Paragraphs 21-22 (Designation of Contractors, Payment of Costs).

#### **IV. FINDINGS OF FACT**

9. Between the 1890s and 1992, Respondent provided continuous rail transport over segments of the Wallace-Mullan Branch (identified hereafter as the "right-of-way" or "ROW") in northern Idaho. The ROW consists of the eastern end of the Wallace Branch and the entire Mullan Branch. The Wallace Branch portion extends for 63.8 miles, from approximately Milepost 16.6 at Plummer Junction to Milepost 80.4 in Wallace. The Mullan Branch extends 7.6 miles from Milepost

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2 0 at Wallace (coincident with the eastern terminus of the Wallace Branch) to the east side of Mullan  
3 at Milepost 7.6. The western end of the ROW begins in Benewah County, west of Coeur d'Alene  
4 Lake, crosses Coeur d'Alene Lake via a trestle bridge, enters Kootenai County, proceeds north along  
5 the eastern edge of the Lake through the Coeur d'Alene Indian Tribe Reservation, then turns east,  
6 following the main stem of the Coeur d'Alene River, and then following the South Fork of the Coeur  
7 d'Alene River to the eastern terminus of the ROW at Mullan. Between Plummer and Mullan, the  
8 ROW passes through a number of residential communities, including Harrison, Rose Lake, Cataldo,  
9 Osburn, and Wallace. The ROW also passes through and past numerous lakes, marshes, and other  
10 sensitive ecosystems, including Anderson Lake, Swan Lake, Cave Lake, and Lane Marsh. These  
11 lakes and marshes provide habitat for fish, mammals, raptors, and waterfowl, and support  
12 populations of federally protected species including the bald eagle and bull trout.

13 10. Construction of the Wallace Branch took place between 1888 and 1890. The branch  
14 line was constructed and operated by the Washington & Idaho Railroad Company, a predecessor to  
15 the Oregon-Washington Railroad and Navigation Co., which later became part of Respondent. In the  
16 1890s, the Mullan Branch was constructed by the Northern Pacific Railway Company, which in the  
17 1960s became Burlington-Northern Inc. The Mullan Branch was purchased by Respondent in 1980.

18 11. For some segments of the ROW, particularly along the South Fork of the Coeur  
19 d'Alene River, the track bed was constructed over fluvially deposited mill tailings. Additionally,  
20 some segments of the ROW in this area were constructed over locally available mine waste rock  
21 used as fill. Materials originally used to construct the ballast section of the rail line throughout the  
22 ROW consisted of a mixture of mill tailings, waste rock, and locally available gravels.

23 12. During its decades of operation, the ROW primarily served the mining industry,  
24 transporting ores and concentrated materials from mining and milling operations. Rail sidings were  
25 built to serve mining facilities, saw mills, rock quarries, warehouses, fueling stations, and  
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2 maintenance facilities. Concentrates have been discovered within the ROW and particularly within  
3 the siding areas where loading and handling of mining materials resulted in spillage.

4 13. Mill tailings, waste rock, and concentrates within the ROW contain high levels of  
5 metals including arsenic, cadmium, lead, and zinc. Such metals are hazardous substances, as defined  
6 by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and the NCP at 40 C.F.R. Part 302.4. Data  
7 on the concentrations of such hazardous substances in soils within the ROW are provided in Tables  
8 2-1 through 2-5 of the EE/CA.

9 14. Exposures to arsenic, cadmium, lead, and zinc are known or suspected to cause a  
10 variety of adverse health and environmental effects, as described below:

11 A. Arsenic. Exposure to arsenic has been linked to increased incidence of human  
12 lung and skin cancer. Chronic arsenic exposure can produce malaise, fatigue,  
13 changes in skin pigmentation, and gastrointestinal disturbances. Acute  
14 exposure to certain arsenic compounds can be fatal.

15 B. Cadmium. Cadmium has been demonstrated to cause cancer in animals.  
16 Animal carcinogens are suspected human carcinogens. Cadmium may also be  
17 a mutagen (causes changes in genes or organisms that are perpetuated in  
18 subsequent cell divisions which produce offspring of the organism).  
19 Cadmium can cause sterility in animals and can adversely affect the kidneys,  
20 bones, liver, reproductive system, respiratory tract, and immune system.  
21 Cadmium has been reported to cause hypertension in animals. It can interact  
22 with other metals, such as copper, iron, and zinc, and can cause symptoms  
23 associated with their deficiency such as anemia. Cadmium can accumulate in  
24 the kidneys and liver of animals.

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2 C. Lead. Exposure to lead can cause severe health impacts, particularly in small  
3 children and fetuses. Children at play are at greatest risk of exposure because  
4 children are most likely to inhale or ingest soil particles. High exposures to  
5 lead may result in convulsions or death. Children exposed to lower levels of  
6 lead may have permanent effects such as decreased IQ, impaired hearing, and  
7 reduced growth. In adults, lead exposure may affect memory, decrease  
8 reaction time, and damage the male reproductive system.

9 D. Zinc. Although small amounts of zinc are essential to many forms of life, zinc  
10 is known to be toxic at elevated levels to a number of animal species,  
11 including humans. Fish are notably sensitive to elevated concentrations of  
12 zinc. Zinc readily dissolves in water, and can be readily transported by the  
13 movement of surface or ground water.

14 15. As part of the EE/CA for the ROW, a Streamlined Risk Assessment was developed to  
15 evaluate the potential risk to human health from exposure to the metals identified above. See  
16 EE/CA Appendix A. The Streamlined Risk Assessment assumes a future land use of the ROW as a  
17 recreational trail. Within this anticipated future land use, three exposure scenarios were identified:  
18 residential; child and adult recreational; and adult occupational. The residential exposure scenario  
19 recognizes that the ROW passes through a number of residential communities, including, for  
20 example, the town of Wallace, where nearly 1000 people live within one mile of the ROW. The  
21 recreational exposure scenario anticipates children and adults using the ROW in the future as a  
22 recreational trail. The adult occupation exposure scenario anticipates the future need for workers to  
23 maintain the recreational trail. Within each of these three scenarios, anticipated exposures through  
24 soil ingestion were determined to be unacceptably high under a "No Action" alternative.

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2 16. In developing the EE/CA and related technical documents, a number of field  
3 inspections of the ROW were conducted. During these field inspections, and through other sources  
4 of information, several specific areas, including particular wetlands, within or adjacent the ROW  
5 were identified where railroad ties, tracks, and other track materials had been disposed improperly.  
6 Railroad ties and other debris may often be contaminated with hazardous substances including those  
7 metals identified in Paragraph 14. The improper disposal of contaminated railroad ties and other  
8 debris into wetlands and other areas in or adjacent the ROW thus presents the possibility of exposing  
9 hazardous substances to human and ecological receptors.

10 17. A segment of the ROW, approximately 7.9 miles, crosses an area known as the  
11 "Bunker Hill Superfund Site." This segment of the ROW is being addressed through remedial  
12 actions selected in a CERCLA Record of Decision, issued by EPA and the State in 1992. Remedial  
13 actions on this segment of the ROW are being implemented by Respondent pursuant to a consent  
14 decree entered by EPA, the State, and Respondent in 1995.

15 18. In order to protect human health along the ROW outside the Bunker Hill Superfund  
16 Site, the EE/CA recommends that a number of response actions be taken. These response actions  
17 include the following: removal of ballast and concentrates; removal of tracks, ties, and other track  
18 materials; removal of soils and sediments from areas where tracks, ties, and other track materials had  
19 been improperly disposed; placement of a ten-foot wide asphalt barrier over the former rail bed;  
20 placement of clean gravels and soils over rail bed shoulders, within and around residential areas, and  
21 in areas designated as clean "oases"; creation, distribution, and placement of educational or  
22 informational materials; and operation and maintenance of the recreational trail. Based on available  
23 information, implementation of these response actions is expected to protect human health from  
24 possible exposures to metals presently located within the ROW and is expected to contribute to the  
25 efficient performance of any long-term remedial actions within or adjacent the ROW.

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3 **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

4 19. Based on the Findings of Fact set forth above, and the Administrative Record  
5 supporting the selected removal actions, EPA has determined that:

- 6 A. The ROW is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C.  
7 § 9601(9). Substances found in the ROW, including the metals identified in  
8 the Findings of Fact above, constitute "hazardous substances" as defined by  
9 Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).  
10 B. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42  
11 U.S.C. § 9601(21).  
12 C. Respondent is liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a),  
13 as provided below:  
14 a. Respondent is the present "owner" and/or "operator" of the facility, as  
15 defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and  
16 within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. §  
17 9607(a)(1).  
18 b. Respondent was an "owner" and/or "operator" of the facility at the  
19 time of disposal of any hazardous substances described in this section  
20 at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. §  
21 9601 (20), and within the meaning of Section 107(a)(2) of CERCLA,  
22 42 U.S.C. § 107(a)(2).  
23 c. Respondent arranged for disposal or treatment, or arranged for  
24 transport for disposal or treatment of hazardous substances at the  
25 facility, by any other party, at any facility, and within the meaning of  
26 Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607 (a)(3).  
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2 d. Respondent accepts or accepted hazardous substances for transport to  
3 the facility, within the meaning of Section 107(a)(4) of CERCLA, 42  
4 U.S.C. § 9707(a)(4).

5 D. The conditions described in the Findings of Fact above constitute an actual or  
6 threatened "release" of a hazardous substance from the facility as defined by  
7 Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

8 E. The conditions present in the ROW constitute an imminent and substantial  
9 endangerment to public health, welfare, or the environment. These factors  
10 include, but are not limited to, the following: —

- 11 a. actual or potential exposure of nearby human populations, animals,  
12 and aquatic organisms to hazardous substances;  
13 b. actual or potential contamination of sensitive ecosystems;  
14 c. elevated concentrations of hazardous substances in soils largely at or  
15 near the surface, that may migrate;  
16 d. the anticipated future use of the ROW as a recreational trail, drawing  
17 children and adults to remote areas with high concentrations of  
18 contaminants.

19 F. The actual or threatened release of hazardous substances within and from the  
20 ROW may present an imminent and substantial endangerment to the public  
21 health, welfare, or the environment within the meaning of Section 106(a) of  
22 CERCLA, 42 U.S.C. § 9606(a).

23 G. The response actions identified in the EE/CA are necessary to protect the  
24 public health, welfare, or the environment, are not inconsistent with the NCP  
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2 and CERCLA, and are expected to contribute to the efficient performance of  
3 any long-term remedial actions within or with respect to the ROW.

4 **VI. ORDER**

5 20. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations,  
6 and the Administrative Record supporting the EE/CA, it is hereby ordered and agreed that  
7 Respondent shall comply with the provisions of this Order, including, but not limited to, all  
8 attachments to this Order, and all documents incorporated by reference into this Order, and as  
9 described in this Section.

10 21. Designation of Contractor, Project Coordinator, and On-Scene Coordinator

11 A. Selection of Supervising Contractor. All aspects of the Work to be performed  
12 by Respondent pursuant to this Order shall be under the direction and supervision of the Supervising  
13 Contractor. McCulley, Frick & Gilman, Inc. has been selected by Respondent and approved by EPA  
14 as Supervising Contractor. If at any time hereafter, Respondent proposes to change its Supervising  
15 Contractor, Respondent shall give such notice to EPA and must obtain an authorization to proceed  
16 before the new Supervising Contractor performs, directs or supervises any Work under this Order.

17 B. If EPA disapproves a proposed Supervising Contractor, EPA will notify  
18 Respondent in writing. Respondent shall submit to EPA a list of contractors, including the  
19 qualifications of each contractor, that would be acceptable to it within 30 days of receipt of EPA's  
20 disapproval of the contractor previously proposed. EPA will provide written notice of the names of  
21 any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other  
22 contractors. Respondent may select any contractor from that list that is not disapproved and shall  
23 notify EPA of the name of the contractor selected within 21 days of EPA's authorization to proceed.

24 C. If EPA fails to provide written notice of authorization to proceed or  
25 disapproval as provided in this Paragraph and this failure prevents Respondent from meeting one or  
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2 more deadlines in a plan approved by EPA pursuant to this Order, Respondent may seek relief under  
3 the provisions of Section X (Force Majeure) hereof.

4 D. Respondent has designated Mike Cooper of McCulley, Frick & Gilman, Inc.,  
5 as its Project Coordinator who shall be responsible for administration of all the Respondent's actions  
6 required by the Order. To the greatest extent possible, the Project Coordinator shall be present at the  
7 Project Area or readily available during Work at the Project Area. Receipt by Respondent's Project  
8 Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt  
9 by Respondent.

10 E. EPA has designated Earl Liverman of the EPA Coeur d'Alene Field Office as  
11 its On-Scene Coordinator (OSC). Respondent shall direct all submissions required by this Order to  
12 the OSC at the following address:

13 EPA Region 10 Coeur d'Alene Field Office  
14 1910 Northwest Blvd., Suite 208  
Coeur d'Alene, ID 83814

15 F. EPA and Respondent shall have the right to change their designated OSC or  
16 Project Coordinator. Respondent shall notify EPA ten days before such a change is made. This  
17 initial notification may be orally made but it shall be promptly followed by a written notice.

18 22. Payment of Construction Oversight Costs.

19 A. Within seven days of the effective date of this Order, Respondent shall pay  
20 \$650,000 to the EPA Hazardous Substance Superfund to provide for Construction Oversight Costs.  
21 Payment shall be made by FedWire Electronic Funds Transfer ("EFT" or wire transfer) in  
22 accordance with instructions to be provided by EPA. Payment shall be designated as "Oversight  
23 Costs - Wallace-Mullan Branch" and shall reference Respondent's name and address, EPA Site  
24 103D, and the docket number of this Order. Respondent shall send notice that such payment has  
25 been made to the following address:

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2 Regional Financial Management Officer  
3 U.S. EPA Region 10  
4 1200 Sixth Avenue  
5 Seattle, WA 98101

6 B. Within fifteen days of receipt by EPA of a submittal from the GPC that  
7 serves as a basis for payment by EPA of Construction Oversight Costs from the EPA Hazardous  
8 Substance Superfund, EPA will provide a copy of that submittal to Respondent.

9 C. The total amount to be paid by Respondent pursuant to this Order shall be  
10 deposited in the Wallace-Mullan Branch Special Account within the EPA Hazardous Substance  
11 Superfund to be retained and used to conduct or finance response actions, including oversight  
12 activities of the Governments' Project Coordinator, at or in connection with the Coeur d'Alene Basin  
13 Environment, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

14 D. The total amount paid by Respondent pursuant to this Order shall be credited  
15 by EPA against the amount payable by Respondent under the Consent Decree for "Future Response  
16 Costs," as that term is defined in the Consent Decree.

17 E. In the event that the payment of Construction Oversight Costs is not made  
18 within seven working days of the effective date of this Order, Respondent shall pay interest on the  
19 unpaid balance. Interest is established at the rate specified in Section 107(a) of CERCLA, 42 U.S.C.  
20 § 9607(a). The interest to be paid shall begin to accrue on the effective date of the Order. Interest  
21 shall accrue at the rate specified through the date of the payment. Payments of interest made under  
22 this Paragraph shall be in addition to such other remedies or sanctions available to EPA by virtue of  
23 Respondent's failure to make timely payments under this section.

24 23. Work to Be Performed.

25 A. Respondent has petitioned the federal Surface Transportation Board (STB) for  
26 permission to salvage the Wallace-Mullan Branch railroad right-of-way. Consistent with the  
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2 National Trails System Act, 16 U.S.C. § 1247(d), the State and Tribe have indicated their willingness  
3 to accept and manage the right-of-way for recreational purposes pursuant to a Certificate of Interim  
4 Trail Use (CITU) to be issued by the STB. Respondent shall proceed to implement the Work  
5 required by this Paragraph when the following two conditions precedent are satisfied:

6 (1) a final decision by the STB approving salvage for the right-of-way.  
7 However, if, after such a final decision of the STB, there is a court order or any other administrative  
8 or judicial decision overturning the STB decision or enjoining or otherwise preventing Respondent  
9 from commencing salvage or otherwise performing Work in the Project Area under this Order, this  
10 condition precedent will not be met until such court order or other administrative or judicial decision  
11 overturning the STB decision or enjoining or otherwise preventing Respondent from commencing  
12 salvage or otherwise performing Work in the Project Area under this Order is vacated, reversed,  
13 overruled or otherwise overturned and the STB decision is affirmed or otherwise reinstated; and

14 (2) STB issuance of a CITU to the State and Tribe. However, if, after  
15 such STB issuance of a CITU to the State and Tribe there is a court order or any other administrative  
16 or judicial decision overturning the STB decision or enjoining or otherwise preventing Respondent  
17 from commencing salvage or otherwise performing Work in the Project Area under this Order, this  
18 condition precedent will not be met until such court order or other administrative or judicial decision  
19 overturning the STB decision or enjoining or otherwise preventing Respondent from commencing  
20 salvage or otherwise performing Work in the Project Area under this Order is vacated, reversed,  
21 overruled or otherwise overturned and the STB decision is affirmed or otherwise reinstated.

22 In the event that either or both of the two conditions precedent identified in this Paragraph  
23 has not been satisfied, the Parties recognize that the failure of satisfying the condition precedent will  
24 constitute a Force Majeure event to the extent that it prevents Respondent from commencing salvage  
25 or otherwise performing Work in the Project Area and therefore agree to extend all deadlines under  
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2 this Order for the length of time Respondent is prevented from commencing salvage or otherwise  
3 performing Work in the Project Area. In the event that there is a court order or other judicial or  
4 administrative decision overturning either or both of the STB decisions identified in the two  
5 conditions precedent, and all rights of appeal have been exhausted or a deadline for appeal of such  
6 decision has expired, and Respondent is thus permanently enjoined or prevented from commencing  
7 salvage or otherwise performing Work in the Project Area, then this Order will automatically be null  
8 and void and without any effect.

9           B.       Respondent shall carry out the Work consistent with the schedule contained in  
10 Section 5 of the SOW, as revised (MFG, Jan. 7, 2000), except that approvals by the "Governments"  
11 shall be provided by EPA in consultation with the State and Tribe. Such Work shall be carried out  
12 consistent with the Statement of Work, attached to this Order as Appendix A. Such Work shall also  
13 be carried out consistent with the Attachments to the Statement of Work, which are hereby  
14 incorporated by reference. These Attachments to the SOW are identified as follows:

- 15                   a.       Track Salvage Work Plan
- 16                   b.       Flood Damage Repair Work Plan
- 17                   c.       Response Action Work Plan for Removals, Disposal, and Protective  
18                               Barriers Element of Work
- 19                   d.       Response Action Design Drawings
- 20                   e.       Maintenance and Repair Plan
- 21                   f.       Wetlands Plan
- 22                   g.       Project Material and Placement Specifications
- 23                   h.       Material Acceptance and Placement Requirements for Slag Pile Area

24           C.       Respondent shall also carry out the Work consistent with other work plans that  
25 are to be developed pursuant to the SOW. Such work plans shall be submitted to the Governments  
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2 pursuant to Sections 4 and 5 of the SOW. EPA, in consultation with the State and Tribe, may  
3 approve, disapprove, require revisions to, or modify the draft work plan. If EPA requires revisions,  
4 Respondent shall submit a revised draft work plan within 14 days, or as otherwise approved by EPA,  
5 of receipt of EPA's notification of the required revisions. Respondent shall implement the work plan  
6 as finally approved, in writing, by EPA in accordance with the schedule provided in Section 5 of the  
7 SOW. Once approved, or approved with modifications, such work plan and any subsequent  
8 modifications shall be fully enforceable under this Order. Respondent shall notify the Governments  
9 at least 48 hours prior to performing any work within the Project Area pursuant to an approved work  
10 plan. Respondent shall not commence or undertake any response action within the Project Area  
11 without prior EPA approval.

12 24. Health and Safety Plan. Respondent has prepared a Project Health and Safety Plan  
13 (MFG, January 2000) as required by the Consent Decree. This Project Health and Safety Plan is  
14 hereby incorporated by reference into this Order. Any actions taken by Respondent pursuant to this  
15 Order shall be conducted consistent with this Plan.

16 25. Quality Assurance and Sampling  
17 Respondent shall use quality assurance, quality control, and chain of custody  
18 procedures for all treatability, design, compliance and monitoring samples in accordance with the  
19 SOW, as further described in an approved Project Quality Assurance/Quality Control Plan.

20 26. Reporting

21 A. In addition to any other requirement of this Order, Respondent shall submit to  
22 Governments written reports as set forth in the SOW

23 B. Respondent shall, at least 30 days prior to the conveyance of any interest in  
24 real property within the ROW, give written notice of this Order to the prospective transferee and  
25 written notice to the Governments of the proposed conveyance, including the name and address of  
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2 the transferee. Respondent shall require that the transferee comply with Paragraph 27 of this Order  
3 (Access to Property and Information).

4 27. Access to Property and Information. If the Project Area, or any other property where  
5 access and/or land/water use restrictions are needed to implement this Order in accordance with the  
6 SOW, is owned or controlled by Respondent, Respondent shall :

7 A. commencing on the effective date of this Order, provide the Governments, and  
8 their designated representatives, including their contractors, with access at all reasonable times to the  
9 Project Area, or such other property, for the purpose of conducting any activity related to this Order  
10 including, but not limited to, the following activities:

- 11 a. Monitoring and performing the Work;
  - 12 b. Verifying any data or information submitted to EPA, the State or the  
13 Tribe;
  - 14 c. Conducting investigations relating to contamination at or near the  
15 Project Area;
  - 16 d. Obtaining samples;
  - 17 e. Assessing the need for, planning, or implementing additional response  
18 actions at or near the Project Area;
  - 19 f. Inspecting and copying records, operating logs, contracts, or other  
20 documents maintained or generated by Respondent or its agents,  
21 consistent with Section XXV (Access to Information) of the Consent  
22 Decree; and
  - 23 g. Assessing Respondent's compliance with this Order.
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2 B. commencing on the effective date of Order, refrain from using the Project  
3 Area, or such other property, in any manner that would interfere with or adversely affect the integrity  
4 or protectiveness of the response action to be implemented pursuant to the SOW and this Order.

5 28. If the Project Area, or any other property where access and/or land/water use  
6 restrictions are needed to implement the SOW, is owned or controlled by persons other than the  
7 Respondent, then Respondent shall use best efforts to secure from such persons:

8 A. an agreement to provide access thereto for Respondent and the Governments,  
9 as well as for their representatives (including contractors), for the purpose of conducting any activity  
10 related to this Order; and

11 B. an agreement, enforceable by the Respondent and the United States, to refrain  
12 from using the Project Area, or such other property, in any manner that would interfere with or  
13 adversely affect the integrity or protectiveness of the response action to be implemented pursuant to  
14 the SOW and this Order.

15 29. If any access or land/water use restriction agreements required by this Order are not  
16 obtained within 45 days of the effective date of this Order, Respondent shall promptly notify the  
17 Governments in writing, and shall include in that notification a summary of the steps that  
18 Respondent has taken to attempt to comply with Paragraph 28 of this Order. EPA may, as it deems  
19 appropriate, assist Respondent in obtaining access or land/water use restrictions.

20 30. Record Retention, Documentation, Availability of Information

21 A. Until five years after Respondent's receipt of EPA's Notice of Completion  
22 pursuant to Section XVIII of this Order, Respondent shall preserve and retain all records and  
23 documents now in its possession or control or which come into its possession or control that relate in  
24 any manner to the performance of the Work or liability of any person for response actions conducted  
25 and to be conducted at the Project Area, regardless of any corporate retention policy to the contrary.  
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2 Until five years after Respondent's receipt of EPA's Notice of Completion, Respondent shall also  
3 instruct its contractors and agents to preserve all documents, records, and information of whatever  
4 kind, nature or description relating to the performance of the Work.

5 B. At the conclusion of this document retention period, Respondent shall notify  
6 the Governments at least ninety days prior to the destruction of any such records or documents, and,  
7 upon request by EPA, the State or the Tribe, Respondent shall deliver any such records or documents  
8 to EPA, the State or the Tribe. Respondent may assert that certain documents, records and other  
9 information are privileged under the attorney-client privilege or any other privilege recognized by  
10 federal law. If Respondent asserts such a privilege, it shall provide the Governments with the  
11 following: (1) the title of the document, record, or information; (2) the date of the document, record  
12 or information; (3) the name and title of the author of the document, record or information; (4) the  
13 name and title of each addressee and recipient; (5) a description of the subject of the document,  
14 record or information; and (6) the privilege asserted by Respondent. However, no final (including the  
15 most recent draft when there is no "final" version) documents, reports or other information created or  
16 generated pursuant to the requirements of this Order shall be withheld on the grounds that they are  
17 privileged.

18 C. Respondent may assert a business confidentiality claim pursuant to 40 C.F.R.  
19 § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Order,  
20 provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). If no  
21 such claim accompanies the information when it is received by EPA, EPA may make it available to  
22 the public without further notice to Respondent.

23 31. Off-Site Shipments.

24 A. All hazardous substances, pollutants, or contaminants removed off-site  
25 pursuant to this Order for treatment, storage, or disposal shall be treated, stored, or disposed of at a  
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2 facility in compliance, as determined by EPA in Section 121(d)(3) of CERCLA, 42 U.S.C.  
3 § 9621(d)(3), and the "Revised Procedures for Implementing Off-Site Response Actions", OSWER  
4 Directive Number 9834.11, November 13, 1987. EPA Region 10 will provide information on the  
5 acceptability of a facility under Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and the  
6 above directive.

7           B.       However, EPA shall allow Respondent to place material removed from the  
8 Project Area pursuant to the SOW in the Slag Pile Area within the Bunker Hill Superfund Site  
9 through October 1, 2001. In addition, if this location is generally made available by EPA for the  
10 placement of materials from the Coeur d'Alene Basin after this date, ~~or~~ if other locations are made  
11 generally available by EPA for such placement of materials, they will also be made available to  
12 Respondent. Respondent will be responsible for any additional incremental costs, i.e., costs in  
13 addition to those which would otherwise have been incurred, associated with placement of Project  
14 Area materials at these locations as specified in the SOW. The conditions for Respondent's use of  
15 the Slag Pile Area for disposal are set forth in the SOW.

16           C.       Respondent shall, prior to any shipment of Waste Material from the Project  
17 Area to an out-of-state waste management facility, provide written notification to the appropriate  
18 state environmental official in the receiving facility's state and to EPA of such shipment of Waste  
19 Material.

20                   1.       The Respondent shall include in the written notification, the following  
21 information, where available: (1) the name and location of the facility to which the Waste Material  
22 is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected  
23 schedule for the shipment of the Waste Material; and (4) the method of transportation. The  
24 Respondent shall notify the state in which the planned receiving facility is located of major changes  
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2 in the shipping plan, such as a decision to ship the Waste Material to another facility within the same  
3 state, or to a facility in another state.

4                   2.       The identity of the receiving facility and state will be determined by  
5 the Respondent following the award of the contract for SOW implementation. The Respondent shall  
6 provide the information required by this Paragraph as soon as practicable after the award of the  
7 contract and before the Waste Material is actually shipped.

8           32.    Compliance With Other Laws. All activities undertaken by Respondent pursuant to  
9 this Order shall be performed in accordance with the requirements of all applicable federal, state and  
10 tribal laws and regulations. To the extent practicable considering the exigencies of the situation, the  
11 Work shall attain applicable or relevant and appropriate requirements under federal, state and tribal  
12 environmental or facility siting laws as set forth in the EE/CA. The activities conducted pursuant to  
13 this Order, if approved by EPA, shall be considered to be consistent with the NCP.

14           33.    Emergency Response and Notification of Releases

15           A.       In the event of any action or occurrence during the performance of the Work  
16 which causes or threatens a release of hazardous substances from the Project Area that constitutes an  
17 emergency situation or may present an immediate threat to public health or welfare or the  
18 environment, Respondent shall immediately take all appropriate action to prevent, abate, or  
19 minimize such release or threat of release, and shall immediately notify the Governments' Project  
20 Coordinator, or, if the GPC is unavailable, EPA's Project Coordinator. If neither of these persons is  
21 available, Respondent shall notify the EPA Emergency Response Unit, Region 10, at the 24-hour  
22 emergency response phone: 1-800-424-8802. Respondent shall take such actions in consultation  
23 with the GPC or other available authorized EPA officer and in accordance with all applicable  
24 provisions of the Project Health and Safety Plan and any other applicable plans or documents  
25 developed pursuant to the SOW. In the event that Respondent fails to take appropriate response

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2 action as required by this Section, and EPA or, as appropriate, the State or Tribe, take such action  
3 instead, Respondent shall reimburse EPA, the State and the Tribe all costs of the response action not  
4 inconsistent with the NCP pursuant to Section VIII (Reimbursement of Costs).

5 B. Subject to Section XIV of this Order (Covenant Not To Sue), nothing in this  
6 Paragraph or in this Order shall be deemed to limit any authority of the EPA, the State, and the Tribe  
7 to (a) take all appropriate action to protect human health and the environment or to prevent, abate,  
8 respond to, or minimize an actual or threatened release of hazardous substances on, at, or from the  
9 Project Area, or (b) direct or order such action, or seek an order from the Court, to protect human  
10 health and the environment or to prevent, abate, respond to, or minimize an actual or threatened  
11 release of hazardous substances on, at, or from the Project Area.

12 C. In addition, in the event of any release of a hazardous substance from the  
13 Project Area, Respondent shall submit a written report to the Governments within seven days after  
14 each release, setting forth the events that occurred and the measures taken or to be taken to mitigate  
15 any release or endangerment caused or threatened by the release and to prevent the reoccurrence of  
16 such a release. This reporting requirement is in addition to, not in lieu of, reporting under Section  
17 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and  
18 Community Right-To-Know Act of 1986, 42 U.S.C. § 11001, et. seq.

## 19 VII. AUTHORITY OF THE OSC AND GPC

20 34. The OSC, in coordination with the Governments' Project Coordinator, shall be  
21 responsible for overseeing the Respondent's implementation of this Order. The GPC shall have the  
22 authority lawfully vested in a Remedial Project Manager and an On-Scene Coordinator by the  
23 National Contingency Plan, 40 C.F.R., Part 300. In addition, the GPC shall have authority,  
24 consistent with the National Contingency Plan, to halt any Work required by this Order and to take  
25 any necessary response action when he determines that conditions at the Project Area constitute an  
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2 emergency situation or may present an immediate threat to public health or welfare or the  
3 environment due to the release or threatened release of Waste Material. Absence of the OSC or GPC  
4 from the Project Area shall not be cause for stoppage of work unless specifically directed by the  
5 OSC or GPC.

#### 6 **VIII. REIMBURSEMENT OF COSTS**

7 35. All response costs incurred by the United States, State, and Tribe pursuant to this  
8 Order shall be deemed "Future Response Costs" as defined in the Consent Decree, and therefore  
9 subject to reimbursement pursuant to the provisions of Section XVI of the Consent Decree.

#### 10 **IX. DISPUTE RESOLUTION**

11 36. Unless otherwise expressly provided for in this Order, the dispute resolution  
12 procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with  
13 respect to this Order. However, the procedures set forth in this Section shall not apply to actions by  
14 the EPA to enforce obligations of Respondent that have not been disputed in accordance with this  
15 Section. Any dispute which arises under or with respect to this Order shall in the first instance be the  
16 subject of informal negotiations between the parties to the dispute. The period for informal  
17 negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by  
18 written agreement of the parties to the dispute. The dispute shall be considered to have arisen when  
19 one party sends the other parties a written Notice of Dispute.

#### 20 37. **Formal Dispute Resolution.**

21 A. In the event that the parties cannot resolve a dispute by informal negotiations  
22 under the preceding Paragraph, then the position advanced by EPA shall be considered binding  
23 unless, within ten days after the conclusion of the informal negotiation period, Respondent invokes  
24 the formal dispute resolution procedures of this Section by serving on EPA a written Statement of  
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2 Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion  
3 supporting that position and any supporting documentation relied upon by Respondent.

4 B. Within 14 days after receipt of Respondent's Statement of Position, EPA will  
5 serve on Respondent its Statement of Position, including, but not limited to, any factual data,  
6 analysis, or opinion supporting that position and all supporting documentation relied upon by EPA.  
7 Within 14 days after receipt of EPA's Statement of Position, Respondent may submit a  
8 Supplemental Statement of Position in reply. Within 14 days of receipt of Respondent's  
9 Supplemental Statement of Position, EPA may submit a Supplemental Statement of Position.

10 C. After receiving the final Statement or Supplemental Statement of Position,  
11 the Director of the EPA Region 10 Environmental Cleanup Office (ECL) will issue a final  
12 administrative decision resolving the dispute. The decision of the ECL Director shall be  
13 incorporated into and become an enforceable element of this Order upon Respondent's receipt of the  
14 ECL Director's decision regarding the dispute. Respondent's obligations under this Order shall not  
15 be tolled by submission of any objection for dispute resolution under this Section.

16 38. Following resolution of the dispute, as provided by this Section, Respondent shall  
17 fulfill the requirement that was the subject of the dispute in accordance with the agreement reached  
18 or with the ECL Director's decision, whichever occurs.

19 **X. FORCE MAJEURE**

20 39. Respondent agrees to perform all requirements under this Order within the time limits  
21 established under this Order, unless the performance is delayed by a Force Majeure. "Force  
22 Majeure," for purposes of this Order, is defined as any event arising from causes beyond the control  
23 of Respondent, of any entity controlled by Respondent, or of Respondent's contractors, that delays or  
24 prevents the performance of any obligation under this Order despite Respondent's best efforts to  
25 fulfill the obligation. The requirement that Respondent exercise "best efforts to fulfill the

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2 obligation" includes using best efforts to anticipate any potential Force Majeure event and best  
3 efforts to address the effects of any potential Force Majeure event (1) as it is occurring and  
4 (2) following the potential Force Majeure event, such that the delay is minimized to the greatest  
5 extent possible. "Force Majeure" does not include financial inability to complete the Work or a  
6 failure to attain the Performance Standards.

7 40. Respondent shall notify EPA orally within 48 hours after the event, and in writing  
8 within five days after Respondent becomes or should have become aware of events which constitute  
9 a Force Majeure. Such notice shall identify the event causing the delay or anticipated length of  
10 delay, including necessary demobilization and re-mobilization; state the measures taken or to be  
11 taken to minimize the delay; and estimate the timetable for implementation of the measures.  
12 Respondent shall take all reasonable measures to avoid and minimize the delay. Failure to comply  
13 with the notice provision of this Section shall waive any claim of Force Majeure by the Respondent.

14 41. If EPA, after a reasonable opportunity for review and comment by the State and the  
15 Tribe, agrees that the delay or anticipated delay is attributable to a Force Majeure event, the time for  
16 performance of the obligations under this Order that are affected by the Force Majeure event will be  
17 extended by EPA, after a reasonable opportunity for review and comment by the State and the Tribe,  
18 for such time as is necessary to complete those obligations. An extension of the time for  
19 performance of the obligations affected by the Force Majeure event shall not, of itself, extend the  
20 time for performance of any other obligation. If EPA, after a reasonable opportunity for review and  
21 comment by the State and the Tribe, does not agree that the delay or anticipated delay has been or  
22 will be caused by a Force Majeure event, EPA will notify Respondent in writing of its decision. If  
23 EPA, after a reasonable opportunity for review and comment by the State and the Tribe, agrees that  
24 the delay is attributable to a Force Majeure event, EPA will notify Respondent in writing of the  
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length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

42. If the Respondent elects to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondent shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of Paragraphs 39 and 40, above. If Respondent carries this burden, the delay at issue shall be deemed not to be a violation by Respondent of the affected obligation of this Order identified to EPA.

#### **XI. STIPULATED AND STATUTORY PENALTIES**

43. For each day, or portion thereof, that Respondent fails to perform, fully, any requirement of this Order, in accordance with the schedule established pursuant to this Order, Respondent shall be liable as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$5,000	31st day and beyond

44. Upon receipt of written demand by EPA, Respondent shall make payment to EPA within 30 days, unless Respondent invokes dispute resolution in accordance with the provisions of Section IX (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's checks made payable to "EPA Hazardous Substances Superfund," and shall be mailed to:

1  
2 U.S. Environmental Protection Agency  
3 EPA Hazardous Substance Superfund  
4 P.O. Box 360903M  
5 Pittsburgh, Pennsylvania 15251

6 45. All payments made under this Section shall indicate that the payment is for stipulated  
7 penalties, and shall reference the EPA Site 103D, and the name and address of the party making  
8 payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter  
9 shall be sent to:

10 Regional Financial Management Officer  
11 U.S. EPA Region 10  
12 1200 Sixth Avenue  
13 Seattle, Washington 98101

14 46. Even if violations are simultaneous, separate penalties shall accrue for separate  
15 violations of this Order. Penalties accrue regardless of whether EPA has notified Respondent of a  
16 violation or act of noncompliance. The payment of penalties shall not alter in any way Respondent's  
17 obligations to complete the performance of the work required under this Order.

18 47. Nothing in this Order shall be construed as prohibiting, altering, or in any way  
19 limiting the ability of EPA to seek any other remedies or sanctions available by virtue of  
20 Respondent's violation of this Order or of the statutes and regulations upon which it is based,  
21 including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l).  
22 Provided, however, that EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA  
23 for any violation for which a stipulated penalty is provided herein, except in the case of a willful  
24 violation of this Order.

## 25 **XII. RESERVATION OF RIGHTS**

26 48. Except as specifically provided in this Order, nothing herein shall limit the power and  
27 authority of EPA or the United States to take, direct, or order all actions necessary to protect public  
28 health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release



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2 of hazardous substances, pollutants, or contaminants, or hazardous or solid waste on, at, or from the  
3 Project Area. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to  
4 enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate  
5 and necessary, or from requiring the Respondent in the future to perform additional activities  
6 pursuant to CERCLA or any other applicable law. EPA reserves the right to bring an action against  
7 Respondent under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any response costs  
8 incurred by the United States related to this Order or the Project Area and not reimbursed by  
9 Respondent.

### 10 XIII. OTHER CLAIMS --

11 49. By issuance of this Order, the United States and EPA assume no liability for injuries  
12 or damages to persons or property resulting from any acts or omissions of Respondent. The United  
13 States or EPA shall not be deemed a party to any contract entered into by the Respondent or its  
14 directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants  
15 in carrying out actions pursuant to this Order.

16 50. Except as expressly provided in Section XIV (Covenant Not To Sue), nothing in this  
17 Order constitutes a satisfaction or release from any claim or cause of action against the Respondent  
18 or any person not a party to this Order, for any liability such person may have under CERCLA, other  
19 statutes, or the common law, including, but not limited to, any claims of the United States for costs,  
20 damages, and interest under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) and  
21 9607(a).

22 51. This Order does not constitute a preauthorization of funds under Section 111(a)(2) of  
23 CERCLA, 42 U.S.C. § 9611(a)(2). The Respondent waives any claim to payment under Sections  
24 106(b), 111, and 112 of CERCLA, 42 U.S.C. §§ 9606(b), 9611, and 9612, against the United States  
25 or the Hazardous Substance Superfund arising out of any action performed under this Order.

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2 52. No action or decision by EPA pursuant to this Order shall give rise to any right to  
3 judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

4 **XIV. COVENANT NOT TO SUE**

5 53. Except as otherwise specifically provided in this Order, upon issuance of EPA's  
6 Notice of Completion pursuant to Section XVIII of this Order, EPA covenants not to sue Respondent  
7 for judicial imposition of damages or civil penalties or to take administrative action against  
8 Respondent for any failure to satisfy the requirements of this Order except as otherwise reserved  
9 herein.

10 54. Except as otherwise specifically provided in this Order, in consideration and upon  
11 Respondent's payment of the Construction Oversight Costs specified in Paragraph 22 of this Order,  
12 EPA covenants not to sue or to take administrative action against Respondent under Section 107(a)  
13 of CERCLA, 42 U.S.C. § 9607(a), for recovery of such Construction Oversight Costs.

14 55. These covenants not to sue are conditioned upon the complete and satisfactory  
15 performance by Respondent of its obligations under this Order. These covenants not to sue extend  
16 only to the Respondent and do not extend to any other person.

17 **XV. CONTRIBUTION PROTECTION**

18 56. With regard to claims for contribution against Respondent for Matters Addressed in  
19 this Order, the Parties hereto agree that the Respondent is entitled to protection from contribution  
20 actions or claims to the extent provided by Section 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C.  
21 §§ 9613(f)(2) and 9622(h)(4). Nothing in this Order precludes the United States or the Respondent  
22 from asserting any claims, causes of action or demands against any persons not parties to this Order  
23 for indemnification, contribution, or cost recovery.

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2 **XVI. INDEMNIFICATION**

3       57. EPA does not assume any liability by entering into this agreement or by virtue of any  
4 designation of Respondent as EPA's authorized representative under Section 104(e) of CERCLA.  
5 Respondent shall indemnify, save and hold harmless EPA and its officials, agents, employees,  
6 contractors, subcontractors, or representatives for or from any and all claims or causes of action to  
7 the extent such claims arise from, or on account of, negligent or other wrongful acts or omissions of  
8 Respondent, its officers, directors, employees, agents, contractors, subcontractors, and any persons  
9 acting on its behalf or under its control, in carrying out activities pursuant to this Order, including,  
10 but not limited to, any claims arising from any designation of Respondent as EPA's authorized  
11 representative under Section 104(e) of CERCLA. Further, Respondent agrees to pay the United  
12 States costs, including, but not limited to, attorneys' fees and other expenses of litigation and  
13 settlement to the extent such costs arise from, or on account, of claims made against EPA based on  
14 negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees,  
15 agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in  
16 carrying out activities pursuant to this Order. No party to this Order shall be held out as a party to  
17 any contract entered into by or on behalf of any other party to this Order in carrying out activities  
18 pursuant to this Order. No party or any of its contractors shall be considered an agent of any other  
19 party to this Order. The United States shall give Respondent notice of any claim for which the  
20 United States plans to seek indemnification pursuant to this Paragraph, and shall consult with  
21 Respondent prior to settling such claim.

22       58. Respondent waives all claims against EPA for damages or reimbursement or for  
23 set-off of any payments made or to be made to EPA, arising from or on account of any contract,  
24 agreement, or arrangement between Respondent and any person for performance of Work on or  
25 relating to the Project Area, including, but not limited to, claims on account of construction delays.

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2 **XVII. MODIFICATION**

3 59. Modifications to any work plan or schedule, to the extent consistent with the "Scope  
4 of the Response Action" as defined in the Consent Decree, may be made, in writing, by the OSC or  
5 at the OSC's oral direction. If the OSC makes an oral modification, it will be memorialized in  
6 writing within seven days; provided, however, that the effective date of the modification shall be the  
7 date of the OSC's oral direction. Any other requirements of the Order may be modified, in writing,  
8 by mutual agreement of the parties.

9 60. If Respondent seeks permission to deviate from the Statement of Work or any  
10 approved Work Plan or schedule, Respondent's Project Coordinator shall submit a written request to  
11 EPA for approval outlining the proposed Work Plan modification and its basis.

12 61. No informal advice, guidance, suggestion, or comment by EPA or the Governments'  
13 Project Coordinator regarding reports, plans, specifications, schedules, or any other writing  
14 submitted by the Respondent shall relieve the Respondent of its obligations to obtain such formal  
15 approval as may be required by this Order, and to comply with all requirements of this Order unless  
16 it is formally modified.

17 **XVIII. NOTICE OF COMPLETION**

18 62. When EPA determines, after EPA's review of the Final Report, that all removal  
19 actions have been fully performed in accordance with this Order, EPA will provide a Notice of  
20 Completion to the Respondent. If EPA determines that any removal actions have not been  
21 completed in accordance with this Order, EPA will notify the Respondent, provide a list of the  
22 deficiencies, and require that Respondent modify a work plan, if appropriate, in order to correct such  
23 deficiencies. The Respondent shall implement the modified and approved work plan and shall  
24 submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to  
25 implement an approved modified work plan shall be a violation of this Order.

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3 **XIX. PUBLIC COMMENT**

4       63. Final acceptance by EPA of Paragraph 22 (Payment of Construction Oversight Costs)  
5 of this Order shall be subject to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), which requires EPA  
6 to publish notice of the proposed settlement in the Federal Register, to provide persons who are not  
7 parties to the proposed settlement an opportunity to comment, solely, on the cost recovery  
8 component of the settlement, and to consider comments filed in determining whether to consent to  
9 the proposed settlement. After consideration of any comments submitted during the 30 day public  
10 comment period held pursuant to Section 122(i) of CERCLA, EPA may withhold consent to all or  
11 part of Paragraph 22 of this Order if comments received disclose facts or considerations which  
12 indicate that Paragraph 22 of this Order is inappropriate, improper, or inadequate. Otherwise,  
13 Paragraph 22 shall become effective when EPA issues notice to Respondent that EPA is not  
14 withdrawing from this Section of the Order.

15 **XX. SEVERABILITY**

16       64. If a court issues an order that invalidates any provision of this Order or finds that  
17 Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent  
18 shall remain bound to comply with all provisions of this Order not invalidated or determined to be  
19 subject to a sufficient cause defense by the court's order.

20 **XXI. TERMINATION**

21       65. Upon judicial entry of the Consent Decree, the requirements of this Order shall be  
22 superseded and this Order shall terminate and be of no further force or effect. In any event, this  
23 Order shall terminate and be of no further force or effect three months from the date of signature by  
24 the EPA Region 10 official designated below, unless UPRR and EPA agree otherwise.

**XXII. EFFECTIVE DATE**

66. Except as provided in Section XIX (Public Comment), this Order shall be effective immediately upon the signature by the EPA Region 10 official designated below.

The undersigned representative of Respondent certifies that it is fully authorized to enter into the terms and conditions of this Order and to bind the party it represents to this document.

Agreed this 28 day of April, 2000.

By:

  
Lawrence E. Wzorek

Title Assistant Vice President - Law

It is so ORDERED and Agreed this 28 day of April, 2000.

By:

  
Ann Williamson

Date: 4/28/00

Unit Manager, Environmental Cleanup Office  
U.S. Environmental Protection Agency, Region 10

ADMINISTRATIVE ORDER ON CONSENT  
UPRR WALLACE-MULLAN BRANCH

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